

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 MITCHELL KEITH GOODRUM,

4 Plaintiff

5 v.

6 PAUL HENZBURN,

7 Defendant

Case No.: 3:20-cv-00578-RCJ-WGC

**Report & Recommendation of
United States Magistrate Judge**

Re: ECF No. 1, 1-1

9 This Report and Recommendation is made to the Honorable Robert C. Jones, United
10 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28
11 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

12 Plaintiff, who is an inmate incarcerated within the Nevada Department of Corrections
13 (NDOC), has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro se
14 complaint (ECF No. 1-1). For the reasons stated below, the IFP application should be granted,
15 and Plaintiff should be required to pay the \$350 filing fee over time; however, the section 1983
16 claims should be dismissed with prejudice as there is no state action, and any remaining State
17 law claims should be dismissed without prejudice so Plaintiff may raise them in State court if he
18 desires.

19 **I. IFP APPLICATION**

20 A person may be granted permission to proceed IFP if the person “submits an affidavit
21 that includes a statement of all assets such [person] possesses [and] that the person is unable to
22 pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense
23 or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).

1 The Local Rules of Practice for the District of Nevada provide: “Any person who is
2 unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP].
3 The application must be made on the form provided by the court and must include a financial
4 affidavit disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

5 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some
6 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
7 (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the
8 benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

9 An inmate submitting an application to proceed IFP must also “submit a certificate from
10 the institution certifying the amount of funds currently held in the applicant’s trust account at the
11 institution and the net deposits in the applicant’s account for the six months prior to the date of
12 submission of the application.” LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been
13 at the institution for less than six months, “the certificate must show the account’s activity for
14 this shortened period.” LSR 1-2.

15 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount
16 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an
17 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly
18 deposits or the average monthly balance for the six-month period immediately preceding the
19 filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid,
20 the prisoner is required to make monthly payments equal to 20 percent of the preceding month’s
21 income credited to the prisoner’s account. 28 U.S.C. § 1915(b)(2). The agency that has custody
22 of the prisoner will forward payments from the prisoner’s account to the court clerk each time
23 the account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

1 Plaintiff's certified account statement indicates that his average monthly balance for the
2 last six months was \$0.03, and his average monthly deposits were \$0.

3 Plaintiff's application to proceed IFP should be granted. In light of his \$0.03 average
4 balance and no deposits, he should not be required to pay an initial partial filing fee; however,
5 whenever his prison account exceeds \$10, he must make monthly payments in the amount of 20
6 percent of the preceding month's income credited to his account until the \$350 filing fee is paid.

7 II. SCREENING

8 **A. Standard**

9 Under the statute governing IFP proceedings, "the court shall dismiss the case at any time
10 if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal--
11 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii)
12 seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.
13 § 1915(e)(2)(A), (B)(i)-(iii).

14 In addition, under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if
15 feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in
16 which a prisoner seeks redress from a governmental entity or officer or employee of a
17 governmental entity." 28 U.S.C. § 1915A(a). In conducting this review, the court "shall identify
18 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--
19 (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks
20 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b)(1)-(2).

21 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
22 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and
23 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a

1 complaint under these statutes, the court applies the same standard as is applied under Rule
2 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule
3 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232
4 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

5 The court must accept as true the allegations, construe the pleadings in the light most
6 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*,
7 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less
8 stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9
9 (1980) (internal quotation marks and citation omitted).

10 A complaint must contain more than a "formulaic recitation of the elements of a cause of
11 action," it must contain factual allegations sufficient to "raise a right to relief above the
12 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading
13 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
14 a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a
15 plaintiff should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at
16 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

17 A dismissal should not be without leave to amend unless it is clear from the face of the
18 complaint that the action is frivolous and could not be amended to state a federal claim, or the
19 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
20 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

1 **B. Plaintiff's Complaint**

2 Plaintiff sues Paul Henzburn under 42 U.S.C. § 1983 for violations of his rights under the
3 Eighth and Fourteenth Amendments. He also argues that his right to expert witnesses has been
4 violated, that there was a violation of the truth, and the suppression of evidence, and mentions
5 various State statutes he claims were violated.

6 Plaintiff went to trial on criminal charges in January of 2019, and Mr. Henzburn was
7 called as a witness for the state of Nevada. He presented himself as a security consultant for the
8 Wok restaurant. Plaintiff contends that the court and jury understood that he was an expert for
9 the prosecution, but in fact he did not have a license with the State as a video security consultant.
10 Nevertheless, Plaintiff claims that he testified that he has assisted the police by providing
11 surveillance video in the past. Plaintiff asserts that Henzburn committed perjury when he
12 testified as a consultant and when he testified that the Fallon police had asked him for a video
13 from the day in question. Plaintiff contends that Henzburn failed to turn over the entirety of the
14 video. Plaintiff alleges that Henzburn conspired with the Wok restaurant to suppress key
15 evidence in his trial when he failed to provide the full account. Plaintiff was convicted and is
16 serving a sentence of life without the possibility of parole and is housed at Ely State Prison
17 (ESP). Henzburn resides in Fallon, Nevada.

18 § 1983 “‘is not itself a source of substantive rights,’ but merely provides ‘a method for
19 vindicating federal rights elsewhere conferred.’” *Graham v. Connor*, 490 U.S. 386, 393-94
20 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979)). To obtain relief pursuant to
21 section 1983, a plaintiff must establish a “(1) a violation of rights protected by the Constitution
22 or created by federal statute, (2) proximately caused (3) by conduct of a ‘person’ (4) acting under
23 color of state law.” *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).

1 The complaint explicitly acknowledges that Paul Henzburn is a private individual.
2 Therefore, there is no state action and the section 1983 claims should be dismissed with
3 prejudice. Plaintiff references various State statutes; however, there is no basis for the court to
4 exercise jurisdiction over any remaining State law claims. The court expresses no conclusion as
5 to the viability of such claims, but recommends that they be dismissed without prejudice so
6 Plaintiff may bring the claims in State court, if he desires.

7 **III. RECOMMENDATION**

8 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

9 (1) **GRANTING** Plaintiff's IFP application (ECF No. 1). Plaintiff should not be required
10 to pay an initial partial filing fee; however, whenever his prison account exceeds \$10, he
11 is required to make monthly payments in the amount of 20 percent of the preceding
12 month's income credited to his account until the full \$350 filing fee is paid. This is
13 required even if the action is dismissed, or is otherwise unsuccessful. The Clerk should be
14 directed to **SEND** a copy of an order adopting and accepting this Report and
15 Recommendation to the attention of **Chief of Inmate Services for the Nevada**
16 **Department of Corrections**, P.O. Box 7011, Carson City, Nevada 89702.

17 (2) The complaint (ECF No. 1-1) should be **FILED**.

18 (3) The section 1983 claims should be **DISMISSED WITH PREJUDICE**; any
19 remaining State law claims should be **DISMISSED WITHOUT PREJUDICE** so Plaintiff may
20 raise the claims in State court, if he desires; and this action should be closed.

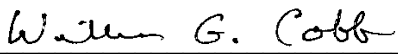
21 Plaintiff should be aware of the following:

22 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
23 this Report and Recommendation within fourteen days of being served with a copy of the Report

1 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s
2 Report and Recommendation” and should be accompanied by points and authorities for
3 consideration by the district judge.

4 2. That this Report and Recommendation is not an appealable order and that any notice of
5 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
6 until entry of judgment by the district court.

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8 Dated: April 8, 2021

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William G. Cobb
United States Magistrate Judge
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